No. 10052.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,

Appellees.

BRIEF FOR APPELLANT.

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Statement of Pleadings and Jurisdiction.

On May 26, 1941, appellees filed in the United States District Court their petition under Section 75 of the Bankruptcy Act, seeking a composition or an extension of time to pay debts, and other relief under said Act [Tr. pp. 2-5]; this petition was approved and referred to Constantine P. Von Herzen, Esq., Conciliation Commissioner, on same date. [Tr. pp. 4-6.]

On November 6, 1941, application for confirmation was filed in the District Court, signed by one of appellees but unverified [Tr. pp. 7-9]. A certificate of Conciliation Commissioner, dated October 22, 1941, was filed in the District Court on November 6, 1941 [Tr. pp. 9-10]. Notice of motion to confirm filed on November 6, 1941 [Tr. p. 11].

On November 17, 1941, appellant filed her petition for leave to proceed with the trial of an action then and since October 1, 1940, pending in the Superior Court of the State of California, in and for the County of Los Angeles [Tr. pp. 12-19]; and on this petition an Order to Show Cause on November 24, 1941, why same should not be granted, was issued on November 17, 1941, as against appellees and one Paul Leiter, their attorney [Tr. pp. 19-20]. On the 17th day of November, 1941, service of Order to Show Cause, with copy of petition of appellant, was served on appellees by mail, and on the 18th on their attorney, Paul Leiter, Esq. [Tr. pp. 21-22]. On the same day, said attorney filed his affidavit in the District Court, setting out that the first meeting of creditors was held on July 17, 1941, and after continuances, consent of a majority of the creditors to a composition was obtained and "that debtors did file application for confirmation of composition on or about November 9, 1941." (*Sic.* Does this mean with Conciliation Commissioner, with whom the law requires such application to be filed? If so, this was three days after the record shows it was filed with the District Court.) The affidavit then sets out a mistake of law that affiant made in misconstruing Rule 50 of the Supreme Court [Tr. pp. 23-24]. On this affidavit an order was made by one of the judges of the court waiving compliance with Rule 50 [Tr. p. 25].

Motion for confirmation (1) and petition of appellant for leave to proceed; (2) came on for hearing in that order but were heard at the same time [Tr. p. 26]. The motion to confirm granted and appellant restrained from

proceeding further in the state court, and referring petition of appellant to Conciliation Commissioner, etc. This was first covered by a minute order [Tr. pp. 26-27]. Then the attorney for appellees prepared an order [Tr. pp. 27-29], which was not signed; and to which appellant filed written objections [Tr. p. 30]; and finally the judge hearing the matter, on December 10, 1941, prepared and signed the order and judgment set out at transcript pages 31-32.

On January 8, 1942, notice of appeal to this Court from portions of this order and judgment was filed in the District Court and served [Tr. p. 33], and at the same time undertaking for costs on appeal was approved and filed [Tr. pp. 34-36]. Thereafter and on January 17, 1942, designation by appellant of points on which she intended to rely on appeal, was served and filed [Tr. pp. 37-41]. On the same date, designation by appellant of papers and matters to be included in the record on appeal was served and filed [Tr. pp. 41-43]; Certificate of Clerk of District Court [Tr. pp. 43-44]; Reporter's Transcript [Tr. pp. 45-70]; Transcript of Record filed with Clerk of this Court, February 16, 1942 [Tr. p. 70]; Statement of points on which appellant intends to rely on appeal, and designation of the portions of the record for consideration thereof, served on February 13, 1942, and filed herein February 16, 1942 [Tr. pp. 71-72].

This appeal was taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Statement of Case.

Both appellant and appellees are residents of the *State of California* [Tr. pp. 2 and 12]. Appellant owns and is in possession of ranch property in the west end of Antelope Valley, in Los Angeles County, California, consisting in part of Section 16 in Twp. 8 N., R. 16 W., S.B.M. The appellant is also the owner and in possession of a certain pipe line, right-of-way for the same, and the water flowing therethrough, running from her above described property into the hills in a southerly direction, a distance of about five miles, where said pipe line gathers and takes into its flow the waters of certain springs. That the appellant and her predecessors in interest have owned and maintained said pipe line and right-of-way for more than forty years last past, and have maintained and used same to convey water from said springs to said ranch for domestic and agricultural purposes. That the appropriation of the water arising from the springs was first made by appellant's predecessor in interest in 1894, and pipe line completed and water flowing to said ranch by July 1, 1895; and that ever since such completion, appellant and her predecessors in interest have owned, been in possession of, and used said pipe line, right-of-way and waters. That at the time said waters and right of way were appropriated, the same was located on and over public land, unappropriated, and belonging to the United States.

That appellees in January, 1939, bought 40 acres of land, situated to the south of appellant's ranch about four miles, and being the NE¼ of the SE¼ of Section 31, Twp. 8 N., R. 16 W., S.B.M., in Los Angeles County, California. Appellant's pipe line and right-of-way for same crosses appellees' land from south to north. That when the predecessor of appellant constructed the pipe

line and acquired the right-of-way for same across the 40 acres of land now owned by appellees, the same was unappropriated public land, and that by reason of this fact appellant's predecessor in interest, to-wit, one Henry Hatch, acquired a vested interest in this right-of-way.

U. S. R. S., Section 2339, provides:

> "That whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other useful purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights, shall be maintained and protected in the same, and the right-of-way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

In *DeWolfskill v. Smith,* 5 Cal. App. 175, 182, the above section is construed:

> "Later this Act was amended by a provision to the effect that all homesteads allowed should be subject to vested and accrued water rights and rights to ditches used in connection therewith.
>
> "By posting the notice appellants from that time became vested with the right to the use of the stream of water then flowing from these wells, together with the right to construct over and across the land the necessary ditches to divert and conduct the same to the place of intended use."

In *Happy Valley Land, etc. Co. v. Nelson,* 169 Cal. 694, 695-6, held:

> "These rights of plaintiff's predecessor, having been acquired over the government lands before their sale in private ownership, gave a vested, possessory title under the Act of Congress of 1866, and required no further or other record title for their support."

In *Smith v. O'Hara,* 43 Cal. 371, and *Simon v. Inyo Cerro Gordo Co.,* 48 Cal. App. 524, 540, the term "ditches" used in said Section 2339 is construed to include "pipes."

The first predecessor of appellees to acquire any interest in the 40 acres involved herein was in December, 1895, or January, 1896, by settlement; the land was then unsurveyed government land, and unappropriated, except for the right-of-way for the Hatch pipe line, which pipe line was in place and in use. It was not until 1904 that patent was issued to appellees' predecessor, and then it contained a specific reservation and exemption in favor of any rights theretofore acquired for ditches carrying water and appropriation made while same was government land.

That soon after appellees acquired their 40 acres, in 1939, they began to trespass upon appellant's right-of-way and pipe line and to appropriate and use the water belonging to appellant flowing therein, to use the water extravagantly and wastefully; that appellant made many protests and objections in 1939 to appellees against such trespasses, and athough they promised and agreed from time to time to desist, they did not do so.

On October 1, 1940, appellant commenced an action in the Superior Court of the State of California, in and for the County of Los Angeles, No. 456533, seeking to enjoin

appellees from continuous trespass upon appellant's right-of-way and wrongful use of water from such pipe line, to quiet title, and for damages and costs.

That on November 1, 1940, after hearing, a preliminary injunction was granted against appellees, restraining them from the use of water flowing in said pipe line for any use whatever except for household use and a reasonable amount to sprinkle a lawn.

That thereafter said action was set for trial March 5, 1941, and trial proceeded for about five days before a judge *pro tem.,* who then declined to proceed further with the case, on account of demands of his private practice. The case went over to be reset and was reset for May 12, 1941, when trial proceeded for another four days, when on May 15, 1941, a stipulation was made in open court for judgment in favor of appellant and against appellees, for a permanent injunction, damages and costs, but allowing appellees a stipulated amount of water for household use only, and the case was continued to May 26, 1941, to permit time to draw the decree. On May 26, appellees in open court withdrew from said stipulation and through their attorney announced that they had that morning filed a petition in bankruptcy. The case in the State court was continued from time to time and is still pending.

That appellant has been at great expense in the two trials of said case in the State court.

On November 6, 1941, application for confirmation of composition or extension proposed under Section 75, Bankruptcy Act, was filed in the United States District Court and proceedings were had, as hereinbefore set out, leading to this appeal.

Assignment of Errors.

(1) That the District Court erred in denying appellant's petition to proceed with the trial of the action pending in the State court.

(2) That the District Court erred in its order and judgment restraining appellant from proceeding with the trial and determination of her action then pending in the State court, in that the *res* involved in said action belonged to appellant and was in her possession.

(3) That the District Court erred in restraining appellant from proceeding further with her action in the State court, in that said action was one to restrain appellees from a continuing trespass.

(4) That the District Court erred in assuming jurisdiction to make an order and judgment restraining the prosecution of an action in the State court commenced more than four months prior to the filing of appellees' petition in bankruptcy.

(5) That the District Court was without jurisdiction to determine, either in a summary proceeding or in a plenary hearing, the matters involved in appellant's suit in the State court, and erred in referring appellant's petition "to the Conciliation Commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition."

(6) That the District Court erred in making such reference to the Conciliation Commissioner, in that neither the District Court nor the Conciliation Commissioner had jurisdiction to hear on the merits the issues involved in appellant's suit then pending in the State court, either in a summary or plenary hearing.

(7) That the District Court was in error in making said reference to the Conciliation Commissioner, in that a bankruptcy court does not have summary jurisdiction nor plenary jurisdiction without the consent of adverse party claimant, to hear and determine the property rights of such adverse claimant who is in the actual or constructive possession of property claimed by such third person.

(8) That the petition of appellant was one for leave to proceed in trial of case in State court, and that alone, and the District Court erred, against the objection of appellant, in ordering a hearing before the Conciliation Commissioner.

(9) That the District Court erred in refusing to recognize the rule of comity, in that appellant's action in the State court had been commenced eight months prior to filing of appellees' petition in the Bankruptcy Court, and that court was entitled to continue with a complete disposition of said case.

(10) That the District Court erred in refusing to grant appellant's petition, under the circumstances disclosed therein, and such refusal was an abuse of discretion, in that said action in the State court had been partly tried twice, at great expense to appellant, and was then in condition for an early determination.

(11) That under the provisions of sub-paragraph (o) of Section 75 of the Bankruptcy Act, it was not a condition precedent that the Court should have before it a hearing and report on the petition for leave to proceed in the State court; and if this was the purpose of the reference to the Conciliation Commissioner, this was error.

ARGUMENT.

I.

Construction of Sub-paragraph (o) of Section 75 of Bankruptcy Act.

> "(o) Except upon petition made to and granted by the judge after hearing and report by the Conciliation Commissioner, the following proceedings shall not be instituted, or, if instituted at any time prior to the filing of a petition under this section, shall not be maintained," etc.

In re Wogstad, 10 Fed. Supp. 349, 350, the phrase, "after hearing and report by the Conciliation Commissioner," contained in sub-paragraph (o), has been construed to mean hearing before and report by Conciliation Commissioner as to agreement on a plan of settlement with creditors, and extension. In that case, at page 350, the Court said:

> "Undoubtedly a bankruptcy court has the jurisdiction and right to allow a creditor to proceed under the first clause of paragraph (o), but this would seem to be limited to a petition made to and granted by the judge after hearing and report by the Conciliation Commissioner. The record fails to show that the Conciliation Commissioner, in this case, has reported to the Court, either that the creditors have agreed upon a plan within the scope of paragraph (g) nor has he reported to the Court that such plan has been attempted and has failed."

It was definitely determined in the case of *McFarland v. West Coast Life Ins. Co.,* 112 Fed. (2d) 567, 569, that the "hearing and report" referred to in paragraph (o) is the hearing and report of Conciliation Commissioner on adjustment of creditors' claims and hearing of petition for an extension, etc. At page 569, the Court said:

> "It has been suggested that the phrase refers to a hearing on the petition to sell. In this case the Commissioner neither heard nor reported on the petition. While the interpretation is arguable, we think it must be rejected. Subdivision o expressly provides that the petition is to be 'made to and granted by the judge;' and there is no express requirement that it be referred to the Conciliation Commissioner for hearing and report by him. The implication, indeed, is to the contrary."

The district judge hearing appellant's petition did not agree with this construction of paragraph (o) [Tr. pp. 52-55].

II.

Appellant Was an Adverse Claimant as Owner and in Possession of the Property Involved in the Action Pending in the State Court, and the Bankruptcy Court Had No Jurisdiction of Same.

In re Cadillac Brewing Co., 102 Fed. (2d) 369, 370, it was held:

> "A court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy over property held adversely to the bankrupt estate, unless the adverse claimant consents or the claim is merely colorable, and a claim is not to be held to be merely colorable unless a preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color or merit and a mere pretense." (Citing decisions.)
>
> "It is well settled that a court of bankruptcy is without jurisdiction to adjudicate in a summary proceeding a controversy in reference to property held adversely to the bankrupt estate, without the consent of the adverse claimant; that resort must be had by the trustee to a plenary court." (Citing numerous cases.)
>
> *Harrison, Trustee v. Chamberlain,* 271 U. S. 191, 193.

In the case of *Louisville Trust Co. v. Cominger,* 184 U. S. 18 (very often cited), Chief Justice Fuller in delivering the opinion of the Court, in which it was held that the District Court, in a bankruptcy proceeding, did not have jurisdiction to determine in a summary proceeding

the rights of an adverse claimant to property, quotes this from an earlier decision of the Court, at page 25:

> "We think that it could not have been the intention of Congress thus to deprive parties claiming property, of which they were in possession, of the usual processes of the law in defense of their rights. Marshall v. Knox, 16 Wall. 556; Smith v. Mason, 14 Wall. 419."

To the same effect are the cases of *Galbraith v. Vallely,* 256 U. S. 46, 50, and *May v. Henderson,* 268 U. S. 111, 115.

> "Neither exclusive jurisdiction of the debtor nor power to issue process outside the district, confers upon the bankruptcy court the power in a summary proceeding to decide, without the consent of an adverse claimant, a controversy concerning property in his possession, unless his claim be merely colorable. Were it otherwise, every bona fide possessor of property held adversely to a bankrupt could be haled into a distant Federal Court to defend his right to the property whenever the trustee in a reorganization proceeding should choose to corral him summarily."
>
> *In re West Forest Fur Farms of America,* 122 Fed. (2d) 232, 239.

In the case of *Dannell v. Wilson-Wiemer-Wilkinson Co.* (6th Circuit), 109 Fed. (2d) 364, petitioners commenced an action in the State court to foreclose liens of laborers and material men, on money retained by Tennessee Highway Commissioner from payments to highway contractor, prior to adjudication that highway contractor was bankrupt; it was held, gave the Tennessee court prior constructive jurisdiction of the money, and

therefore exclusive power to settle controversies concerning the money, without being subject to *stay of such proceedings* by the bankruptcy court.

At pages 365-366 of the opinion the Court said:

> "Error is based on the broad principle that an adjudication in bankruptcy vests all the property of the bankrupt in the trustee, as of the date of the petition, the filing of which gives the Bankruptcy Court jurisdiction that is paramount and exclusive, with possession and control of the estate, not affected by proceedings in other courts. The principle may at once be conceded as sound and of general application. *It applies, however, but to the property of the bankrupt.*" (Italics ours.)

And at page 366:

> "But aside from these considerations, we must sustain the order below, upon the broader ground that the filing of the petitions to foreclose the liens in Davidson County Court, before the adjudication in bankruptcy gave that court prior constructive jurisdiction of the *res* and, therefore, *the exclusive power to settle controversies concerning it without being subject to a restraint of such proceedings by the Bankruptcy Court.*" (Italics ours.)

Citing *Straton v. New, Trustee in Bankruptcy,* 283 U. S. 318, where it was held that proceedings in a State court commenced more than four months prior to adjudication of bankruptcy could not be enjoined by Bankruptcy Court; quoting from page 331 of that decision:

> "As heretofore noted, there are a few cases which have held that the bankruptcy court may enjoin proceedings brought prior to the filing of the petition, to enforce valid liens which are more than four

months old at the time of the bankruptcy; but those cases are contrary to the decisions of this Court and to the great weight of federal authority."

Citing: *In re Maier Brewing Co.* (C. C. A. 9th Cir.), 65 Fed. (2d) 673, where order enjoining proceedings in State court was reversed. The Court, at page 674, said:

> "If a State court, by proceedings to foreclose or otherwise enforce a valid lien instituted even within four months preceding the filing of a petition in bankruptcy, has acquired control of the property, the bankruptcy court, whatever its jurisdictional power may be, will not enjoin the continuance of such proceedings." (Citing numerous Federal decisions.)

And again on page 674:

> "In bankruptcy, as in equity, 'one court will not snatch a *res* from another's mouth.' In re Greenlie-Halliday Co., 57 Fed. (2d) 173, 174."

In equity the principle is fortified by Judicial Code, Par. 365; 36 Stats. 1162; U. S. C., Title 28, Par. 379 (28 U. S. C. A., Par. 379).

Also an able opinion by Judge Wilbur. In *Ke-Sun Oil Co. v. Hamilton* (C. C. A. 9th), 61 Fed. (2d) 215, and citations of Federal cases at page 218, establishing the doctrine that the jurisdiction of a State court having first attached cannot be superseded, taken away or *restrained by writ of Federal court.* (Italics ours.)

In *Hoehn v. McIntosh,* 110 Fed. (2d) 199 (decided 1940), appeal involved an interlocutory order of sale. Order reversed, as "order of sale improvidently granted." (p. 203.) At page 202 the Court said:

> "However, this rule does not apply to the enforcement of liens not invalidated or voided by the Bank-

ruptcy Act, for the enforcement of foreclosure, for which proceedings in the State court have been instituted prior to the commencement of proceedings in bankruptcy, either within or before the four months' period, where the *State court has first acquired actual or constructive possession of the property.* (Italics ours.) (Stratton v. New, 283 U. S. 318, 332, 51 S. Ct. 465, 75 L. Ed. 1060; Davis v. Friedhuber, 104 U. S. 570, 26 L. Ed. 818.)"

III.

Both Appellant and Appellees Are and Were at All Times Involved in These Proceedings Residents and Citizens of the State of California [Tr. pp. 2, 12] and Therefore the Federal Court Would Not Even in a Plenary Proceeding Have Jurisdiction to Determine Appellant's Adverse Claim to the Res.

"If the averment of the appellants that they were in possession adverse to the trustee is based upon a substantial claim, not merely colorable, the court had not jurisdiction to adjudicate title in a summary proceeding, *nor in any proceeding,* since *the parties are not of diverse citizenship and appellants have not given their consent thereto."* (Italics ours.)

In re Cadillac Brewing Co., 102 Fed. (2d) 369, 370.

"An adverse claimant who appears before the referee and sets up his adverse claim, as an objection to the hearing on the merits, shows thereby his objection to the jurisdiction to hear as to title."

Louisville Trust Co. v. Comingor, 184 U. S. 18.

IV.

Appellant's Action in the State Court Was Primarily One for Injunction to Restrain Continuing Trespass and to Quiet Title, and Incidentally for Damages and Costs, and Should Not Be Restrained.

Prosecution of an action of trespass in a State court will not be stayed by Bankruptcy Court.

In re Franks, 49 Fed. (2d) 389;

In re Gumbransky, 8 Fed. Supp. 601.

Such an action is a defensive action, one to protect one's own property from invasion and injury by another. This is the particular action which the law gives to the citizen, to take the place of the shot-gun and rifle, which were employed at one time to protect property and private rights —and particularly line fences, ditches and pipe lines carrying water. But this restraining order issued by the Bankruptcy Court, of which appellant complains, ties her hands and prevents her from proceeding with her suit in the State court, to protect her property.

V.

The Rule of Comity Is Deeply Imbedded in Our Law and Has Universal Recognition.

In the recent case of *Warder v. Brady,* 115 F. (2d) 89 (C. C. A. 4th Cir.), it was held (p. 92):

(1) That money or property held adversely to the bankrupt can only be recovered in a plenary suit, and not by a summary proceeding in bankruptcy.

(2) That if the adverse claim be substantial and the property is in the possession of claimant, the court is without jurisdiction to proceed at all, even in a plenary action, without the consent of the defendant. (Citing many cases.)

(3) That another restriction upon the jurisdiction of the Bankruptcy Court is the rule of comity, which forbids one court from seeking control over the property of the debtor which is already the subject of proceedings in another court, and permits the court first acquiring possession of the property to continue its administration without interruption, until it is complete, and stating that "this principle has complete recognition in this and other federal courts." (Page 92.)

> "The filing of petitioner's proceedings in bankruptcy on August 10, 1934, did not oust the Superior Court of Shasta County of jurisdiction to try and determine the rights of the litigants in the possessory action of ejectment which was pending in that court for more than a year prior to filing of Joerger's petition in bankruptcy." . . . "The United States Dis-

trict Court has specifically authorized the Superior Court of Shasta County to proceed with the trial of the ejectment case."

Joerger v. Superior Court, 2 Cal. App. (2d) 360, 365.

Jurisdiction of State court not suspended in equity to correct mistake in contract.

Strauss v. Bruce, 139 Cal. App. 62, 66;

Zartman v. First Nat'l Bank, 216 U. S. 134.

"When the state court assumes jurisdiction in a case in which it can completely determine the rights of the parties without interfering with the jurisdiction of the federal court, a plea of the pendency of bankruptcy is of no avail. Thus the court may settle property rights where it is alleged that the property involved never belonged to the bankrupt or to his estate, and therefore never passed to the trustee."

Ramey v. McCoy, 193 S. E. (Ga.) 790;

4 *Cal. Jur.* 69.

To the same effect is:

Collier on Bankruptcy, 12th Ed., p. 554;

Heffner v. Jackson, 95 Cal. App. 476, 480.

VI.

Sub-paragraph (o) of Section 75 of Bankruptcy Act Has Application Only to Property of Bankrupt, and No Application to the Property of a Third Person.

In the case of *Tullis v. Pratt et al.* (Utah), 42 Pac. (2d) 222, 224, Chief Justice Hansen said:

> "The provisions of the Bankruptcy Act, relied upon by plaintiff, were not intended to protect one who is unlawfully in the possession of the property of another. Section 75, subdivision (n) of the Act, 11 U.S.C.A., Par. 203 (n), provides that 'the filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located, to the exclusive jurisdiction of the court.' If at the time complained of, the plaintiff was wholly without right in or to the premises in question, obviously the Federal District Court could acquire no jurisdiction, exclusive or otherwise, over property or property rights which had no existence."

Does appellant's action against appellees in the State court fall under any of the subdivisions 1-6 of paragraph (o)? As such action is one to restrain trespass, to quiet title and for damages and costs, it obviously could not come under 2, 3, 4, 5 or 6, and if at all would come under 1, which reads: "Proceedings for any demand, debt, or account, including any money demand."

For definition of "debt," see:

> *Electric Production Co. v. Lewellyn,* C. C. A. (Pa.), 11 Fed. (2d) 493, 494.

"Account" is defined in *Donley v. Bailey,* 110 Pac. 65, 68 (48 Colo. 373), and "demand" as fixing jurisdiction, relates to money demands.

Harlis v. Becker, 24 Cal. App. (2d) 130.

The use of these terms, "demand, debt or account" indicates that they are of the one class, and the words following, "and including any money demand," refers to the same thing and in a sense is tautological.

Wherefore, appellant respectfully suggests that an order be made herein reversing that part and portion of the order and judgment made by the District Court, December 10, 1941, from which this appeal is taken, with costs, and that the District Court be directed to enter an order granting appellant's petition to proceed with the trial and termination of the action now pending in the Superior Court of California, in and for the County of Los Angeles, wherein appellant is plaintiff and appellees are defendants.

Respectfully submitted,

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Attorney for Appellant.